NO. 48556-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STARLA CLEMENS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge
The Honorable F. Mark McCauley, Judge
The Honorable Stephen Brown, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find Appellant delivered a controlled substance within 1,000 feet of a school or school bus route stop.

2. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 3.5.

Issues Pertaining to Assignments of Error

1. Where the prosecution presented evidence that several months before trial there was a school and school bus route stops within 1,000 feet of where the deliveries occurred, but presented no evidence they existed two and a half years earlier when the deliveries occurred, did the state fail to prove appellant delivered a controlled substance within 1,000 feet of a school or school bus route stop?

2. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant s statement. No findings or conclusions were filed in this case. Must this case be remanded for entry of the required findings and conclusions?

Potential Issue Presented[1]

In the event appellant does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's request for an assessment against Appellant for the costs of the appeal?

B. STATEMENT OF THE CASE

The Grays Harbor County Prosecutor charged appellant Starla Clemens with three counts of methamphetamine delivery within 1,000 feet of a school or school bus route stop, and one count of methamphetamine possession. CP 17-19. The prosecutor alleged that from her home in the city of Aberdeen, Clemens delivered methamphetamine to a confidential informant on June 4, 2013, June 26, 2013, and July 14, 2013, and that on September 3, 2014, she possessed methamphetamine while in the city of Ocean Shores. CP 5-8.

A pretrial CrR 3.5 hearing was held October 30, 2015, before the Honorable Judge S. Brown. 1RP.[2] In an oral ruling the court found Clemens' statement to police admissible at trial. 1RP 53-55. No written

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[1] The third argument presented herein pertains to the potential for the assessment of the costs of the appeal under RCW 10.73.160 and RAP 14.4.

[2] There are four volumes of verbatim report of proceedings referenced as follows: 1RP - October 30, 2015 (CrR 3.5 hearing); 2RP- December 14, 2015 (pretrial); and 3RP - two-volume consecutively paginated set for the dates of January 5-7 & 29, 2016 (trial and sentencing).

findings of fact and conclusion of law memorializing this ruling, however, have been filed to date.

At trial, the prosecution presented testimony from Chivonne Sampson, a heroin addict and childhood friend of Clemens, who in an effort to gain leniency on a pending charge, contracted with the Grays Harbor County Drug Task Force to conduct "controlled buys" of methamphetamine from Clemens on three separate occasion in June and July 2013. 3RP 90-185.

The methamphetamine possession charge arose out of the discovery of methamphetamine in Clemens' purse during a search of her and the car she was driving in Ocean Shores in early September 2014. 3RP 281-83. Clemons' confession that she had "dealt drugs in the past," and that the substance found in her purse was an "eight ball of methamphetamine," were admitted at trial. 3RP 277.

In an attempt to prove Clemens' sales of methamphetamine to Sampson in June and July of 2013 occurred within 1,000 feet of a school or school bus route stop, the prosecution introduced a map, Exhibit 16, showing the locations of the schools and school bus route stops within 1,000 feet of Clemens' home, prepared by Ernie Lott, transportation director for the Aberdeen and Hoquiam school districts, and Daniel Ehreth, a geographic information systems (GIS) analyst for the Grays

Harbor County central services department. 3RP 303, 311. According to Lott, school bus stop routes are adjusted annually. 3RP 305. Lott further explained Exhibit 16 had been prepared within months of Clemons' January 2016 trial. 3RP 308-09.

According to Ehreth, the map was last updated on October 6, 2015, and printed for purposes of the trial on December 23, 2015. 3RP 317, 337.[3]

1. THE STATE FAILED TO PROVE THE SCHOOL/SCHOOL BUS ROUTE STOP ENHANCEMENTS BEYOND A REASONABLE DOUBT.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Matter of Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003). The same is true of enhancements. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004).

[3] Although dates testified to by Ehreth did not include the year, the obvious implication from the testimony is that the updating and printing had occurred within months of trial, which would be in 2015.

Under RCW 9.94A.533(6):

> (6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.435 provides:

> (1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
>
> (a) In a school;
>
> (b) On a school bus;
>
> (c) Within one thousand feet of a school bus route stop designated by the school district;
>
> . . . or
>
> (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

Emphasis added.

Under the statute, the state was required to prove Clemens delivered a controlled substance within 1,000 feet of a school or school bus route stop. This means the state was required to prove there was a school or school bus route stop within 1,000 feet of the delivery at the time of the delivery. Otherwise, Clemens did not deliver within 1,000 feet of a school or school bus route stop for purposes of sentencing.

The state presented no such evidence. The closest it came was when Lott testified he had been the director of transportation for the Aberdeen and Hoquiam School Districts for five years, and that at least two of the bus stops depicted on Exhibit 16, the map, had been "established bus stops, community bus stops," since he had been the transportation director, but never said these "community bus stops" were also "school bus route stops." 3RP 307. And he certainly did not say – nor did the state ask – if the school and school bus route stops depicted as being within 1,000 feet of Clemens' home on Exhibit 16 existed in June and July 2013, the only time frame relevant to the delivery charges against Clemens.

Nor can such evidence be inferred from the record. There was no evidence of children congregating or school busses arriving at those locations at the time of the alleged deliveries. In short, there was no

evidence establishing the school or the school bus route stops depicted on the map existed on the date of the offenses.

This Court therefore should reverse and dismiss the sentencing enhancements with prejudice. State v. Hardesty, 129 Wash.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Clemens' statements to law enforcement officers. 1RP 3-55. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

> (c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 ("[T]he State's obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact

and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

3. APPEAL COSTS SHOULD NOT BE IMPOSED

As a final matter, if Clemens does not prevail on appeal, she asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. First, the trial court's effort at establishing Clemens' ability to pay LFOs imposed at the superior court level consisted of one question: "when you get released, are you able to get a job and pay your fines and fees?" 3RP 424. When Clemens responded in the affirmative, the court imposed $2,475 in trial-level LFOs.

CP 42; 3RP 424. The trial court's inquiry establishes that Clemens intends to seek gainful employment once released from incarcerations, but failed to produce any information to support how much in LFOs Clemens can reasonably expect to have the ability to pay. As such, there is no basis to conclude Clemens will have the ability in the future to pay an additional several thousand dollars appellate court and counsel costs.

Second, trial court also chose to honor Clemens' constitutional right to appeal and to appellate counsel even though it also found she "lacks sufficient funds to prosecute an appeal" on her own, and therefore authorized appointment of counsel and production of the necessary appellate record at public expense. CP 56-57. Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (citing RAP 15.2(f)).

In summary, in the event Clemens does not substantially prevail on appeal, this Court should not assess appellate costs against her. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

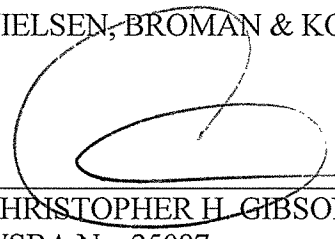
D. CONCLUSION

Because the state failed to prove there was a school or school bus route stop in existence at the time of the deliveries, the enhancements should be reversed and dismissed. Remand is also necessary for entry of written findings of fact and conclusions of law, as required under CrR 3.5.

DATED this 31st day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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